CONCISE EXPLANATORY STATEMENT

Chapter 296-17 WAC General Reporting Rules, Audit and Recordkeeping, Rates and Rating System for Washington Workers' Compensation Insurance

This rulemaking amends the tables of risk classification base premium rates, experience rating calculations, and retrospective rating plan size groupings for the workers' compensation insurance program effective January 1, 2010. The revised risk classification base rates are based on updated loss and payroll experience and an overall average 7.6 percent increase per hour worked. For 2010, the changes to individual risk classifications vary from a rate decrease of 10 percent to a rate increase of 22 percent.

The date of adoption for this rule is November 30, 2009.

The effective date for this rule is January 1, 2010.

The purpose of this document is to respond to the oral and written comments received through the public comment period and public hearings.

The public comment period for this rulemaking began September 22, 2009 and ended November 7, 2009.

Public hearings were held on:

Date/Location		Number Attending	Number Testified
October 27	Tukwila	46	17
October 28	Tumwater	54	32
October 28	Vancouver	50	24
October 29	Bellingham	69	32
October 30	Spokane	68	24
October 30	Richland	21	13

Below is a summary and/or excerpt of the comments we received and the department's response. Where possible, the comments were grouped by industry or subject matter.

RATE INCREASES/RESERVES

Comment: The clerical rate going up 12 percent too? We have NO claims here?????

Comment: …I am interested in why would such a presumptively low injury occupation such as "Accounting, Law and Service Companies" jump 12%, when "orchards" increased only 6%. It seems to me that an equitable allocation of fee increase would be based upon the injury incidents in any particular occupation…Not only are most agricultural composite base rates lower than professional and clerical, but also the increases are also disproportionate…

Department response: The 7.6% proposed general increase is an average across all classifications in Washington. Individual classification changes will be more or less than 7.6%. Some classes have no increase, some have decreases and others have increases. For each class, the proposed rate takes into account anticipated claim costs and work hours estimated by the department's actuaries. These estimates are based on the past experience of all employers that report in the class.

The rate for an individual business may also fluctuate depending on the experience factor the firm has earned. The rate tables show the hourly rate for an experience factor of 1.000. An individual employer's rate will be above or below this published rate, depending on their reported hours and claim costs for injuries and illnesses that occurred during the three years used to establish experience factors. Claim costs for both the class as a whole and for individual employers can be affected by safety practices, return-to-work options for injured workers, and the employer(s)' involvement in the management of claims.

While the percentage increase for an accounting firm in class 5301 was more than the percentage increase for orchards, the overall class rate remains significantly less. Class 5301 received increases by fund similar to the average rate increase for the three funds (4.5 for accident fund, 8.4 for medical aid fund, and 16% for supplemental pension fund). Because the supplemental pension fund is the largest component of the composite rate for this class, and because this fund's rate went up 16% for all classes, the 5301 composite rate increase as a percentage was larger than average.

The commenter indicates the agriculture composite base rates are lower than those for professional and clerical. The 2010 overall average composite rate for agricultural classes is just under 75 cents per hour. For the risk classes in this industry, the increases range from two to 14 percent. The 2010 overall average composite rate for miscellaneous professional and clerical is just over 19 cents per hour.

Comment: There is entirely too much money in reserves that leave room for broken processes to continue to be broken in the department versus looked at and corrected. My research shows that $650 million in "excess contingency reserves" are available. Possibly even more if you look at the Price Waterhouse numbers. This money should be used to buy down the need for a rate increase until an independent audit can be put in place. This will help protect against the potential raids in the 2005 session and the further diversion of workers' compensation funds.

Department response: The State Auditor's Office now provides an independent audit of the insurance funds' reserves together with an audit of the rates. The department has received an unqualified opinion on the reserves and the rates each year.

The department's contingency reserve, or the difference between our assets and liabilities, for the accident and medical aid funds combined was $545 million as of June 30, 2009. This is below our target range drafted in collaboration with business and labor stakeholders. It is also lower than many other state funds, and significantly less than the contingency reserve average for the US property/casualty insurance industry (53 percent as of the end of 2007).

SUPPLEMENTAL PENSION ISSUES/SELF-INSURANCE

Comment: As a self insurer, there is no break on the supplemental pension fund assessment, so my rate for that is going up 16% in addition to paying 100% of all benefits and assessments for self-insurance.

The total indicated rate for the State Fund was shown to be 21.6%, but the Department has deemed that only 7.6% is reasonable due to the economy and/or other reasons. What this means to me is that I don't get any break on the supplemental pension fund. It may not seem all that significant to charge .097 per productive hour, but that is still over a million dollars to our program & employees, mostly for pensions we have no control over. (Roughly 80% of pensions are State Fund.)

Comment: Since our expansion to Washington, we have experienced firsthand the drastic fluctuations of the workers compensation rates; first, as a company covered through the State system and now as a self-insured corporation. These rate increases have been challenging at best as our industry struggles to maintain operations and more importantly, provide family wage jobs for our workers. Currently as a self-insured corporation, we are subject to the proposed 16% increase in the supplemental Pension Fund. This fund pays the cost of living increases for those on temporary and permanent disabilities that result in pensions. We note that since 1998, the assessment both to self insured and State Fund employers has increased 83.3%. We understand that numbers are created by COLA increases which average 4.6% yet we also believe the number of actual pensions that are being awarded to increasingly younger workers also stress the stability of the system. Every pension case is a person who will never be able to return to work. Since COLA is a pay as you go type system, the expense (currently a $12 billion liability) is pulled directly from companies and their employees. With a remarkable number of pensions (an increase of

300% since 1996) being awarded, the Supplemental Pension Fund is being compromised at the expense of Washington employees and businesses.

Department response: The supplemental pension fund is a pay-as-you-go fund, and does not maintain reserves. For this reason, the department must charge the actuarially indicated rate for this fund to be able to make current benefit payments. Benefits from the fund are paid for all claims entitled to annual cost-of-living increases, both state fund and self-insured. Some of these claims are for severe injuries and fatalities that date back forty or fifty years. For these old claims, a large portion of their benefits came from this fund.

The commenter is correct that Washington has experienced a high number of long-term disability and pension claims and that these cases have a significant impact on the payments made from the supplemental pension fund. Self-insurers and the state fund are experiencing similar increasing trends in pensions.

COMMENTS CONCERNING REFORM ISSUES RECEIVED FROM VARIOUS INDUSTRIES INCLUDING CONSTRUCTION, MANUFACTURING, RETAIL, HOSPITALITY, AND MUNICIPALITIES

Comment: We appreciate the Department's efforts to mitigate what could have been a significant rate increase this year. However, no one can argue there are not strong indicators our system needs reform. Specifically, injured workers restricted from full duty end up in the system off work for periods that are three times the national average. In addition, because we have no settlement option in our state, 50% of injured workers off work for more than two years end up with a pension. In fact, our pensions have increased more than 300% since 1996.

We ask that the Department support the following options which would help fix the system <u>without reducing important benefits that workers need most</u>:

Create a settlement option: Allow workers, employers, and Labor and Industries (L&I) the option to settle and release claims for a lump sum. Washington is in a tiny minority of states that forbids this proven claims resolution mechanism.

Better define occupational disease: Washington has one of the broadest occupational disease definitions in the country. It must be revised to exclude conditions that are not work related.

Establish medical provider networks: injured workers deserve access to medical providers trained and experienced in treating their particular condition. This is the practice in 42 other states and we need to establish these networks to treat injured workers statewide.

There are a couple of administrative efficiencies that would help reduce rates for workers and employers; while saving time and costs for the Department:

Require Department claims managers to call the employer before paying timeloss benefits to a worker to ask if they are keeping the person on salary.

Have the Department give workers the option of releasing their Employment Security records in lieu of writing out their entire work history and remembering the dates of employment with each employer.

Comment: We work constantly to find more efficient and effective ways to do business and we implore LI to do the same. There is simply no excuse for a $30 million increase in administrative costs when employers have reduced workplace injuries by 55% since 1990. Please look for ways to increase efficiency and make the Washington workers' comp system more effective.

Department response: Several reform concepts and ideas for administrative efficiencies are expressed in these comments. With regard to potential changes for Washington's workers' compensation system, the department is currently working with selected representatives of business and labor to discuss possible improvements, particularly focusing on the issue of long-term disability and pension cases. We anticipate ideas for change will come from this group and others will likely be submitted independent of this effort. Specific to this rulemaking, if significant changes in the workers' compensation laws are adopted by the 2010 legislature, they may not necessarily affect the level of 2010 premium rates.

Concerning administrative efficiencies, the department is developing system changes to modernize our initial claim filing processes. Process improvements include technology and earlier opportunities to discuss claims with all parties (employers, workers, medical providers). We agree that conversations with employers should include options to help control their costs, such as kept-on-salary.

The suggestions concerning kept-on-salary claims and allowing workers the option of releasing Employment Security records in lieu of completing work histories will be provided to managers in our Claims Administration program. With regard to this last suggestion, while it may be helpful in some cases, it's important to keep in mind that Employment Security records do not include all employment for every worker.

Comment: According to L&I's own data, the total number of claims has actually decreased in recent years. Administrative costs, however, have increased by $39 million dollars in the last year alone. Additionally, the National Academy of Social Insurance reports that Washington State's rate for Workers' Compensation is the second highest per employee in the country. Similar to the market demands of a business, L&I should be held accountable to provide quality services to claimants at a reasonably low cost to taxpayers.

Department response: The increase in administrative costs of $39 million in the last year is not based on L&I's annual budget. This amount reflects the increase in estimated incurred costs needed to manage existing claims through their expected lifetime. Past estimates of future administrative costs are revised as new claims are added and more actual cost information of existing claims is available. These costs reflect that some serious or catastrophic claims will last many, many years.

Similar to the experience in other states, Washington's frequency of claims has decreased over the past several years, but the severity of claims has increased. This means claims last longer and are more complex to manage than in the past.

Actual administrative costs at the department increased by 7% in the last fiscal year, or $18 million, based on our annual cash flow statements.

The National Academy of Social Insurance (NASI) ranks Washington as second or third (depending on which NASI comparison is reviewed) in total benefits to injured workers. This is not the same as having the second highest "rate" per employee.

CLAIMS ISSUES

Comment: We operate under a two-year budget, which has already been adopted for 2009-2010. A smaller rate increase staggered over three years would be easier for us to absorb in 2010 and would allow us to plan for the added expense in our 2011-2012 budget adoption process.

We appreciate the steps L&I has already taken to control costs. We urge you to consider additional steps such as:

1. Introducing a $20 copayment for the use of brand name drugs (thereby forcing the use of more generic drugs).
2. Adopting a pharmaceutical formulary (if not already doing so).
3. Using a preferred provider network (if not already doing so).
4. Placing a cap on chiropractic services (if not already doing so).
5. Adopting more stringent criteria for approving claims.

Department response: In proposing workers' compensation rates for each year, we consider the estimated costs for claims that occur during the year and the expected work hours for the year. As an insurance model, the premiums collected should pay for the cost of the year's anticipated claims. This is why rates are set annually, rather than over a two- or three-year period.

With regard to the suggested cost control measures, a primary goal of the workers' compensation system is to provide medical treatment, at reasonable cost, to an injured worker as quickly as possible so they can return to the workforce. Co-payments are not an option under the law and can interfere with the healing for a worker who may be struggling financially.

About 80 percent of the prescriptions paid on injured worker claims are for generic drugs, and the department uses a pharmaceutical formulary. A "preferred provider network" is not an option under current law, although the department does have an approach for approving surgery requests that expedites and simplifies the process for those doctors who consistently adhere to our guidelines. The department monitors chiropractic services along with the costs of all medical provider specialties and types. We understand chiropractic services have driven up costs in some other states, but this is not the case in Washington.

Finally, the acceptance or denial of a worker's claim is based on the specific facts concerning the worker's injury or occupational disease. Each case is decided based on these facts, the workers' compensation laws, and any court decisions that may apply to the claim. Our claims administration program is implementing additional reviews for many claims to make sure these decisions continue to be consistent and appropriate.

Comment: I pay top rate to provide medical coverage for my employees – but they don't get to use that coverage if they file an L&I claim.

Department response: Medical insurance covers incidents that occur off the job. Workers' compensation covers workers who are injured on the job. Medical providers determine at the time a patient arrives if the injury should be reported to the individual's private health care coverage or as a worker's compensation claim.

Comment: The department received several claim-specific comments describing concerns about claim allowance, workers' medical conditions, return-to-work issues, the appeal process, benefit levels, and delays.

Department response: We will be contacting those who commented about specific claims to learn more about their issues and to allow us to discuss their concerns in more detail taking into account the history and facts of the individual case.

FRAUD ISSUES

Comment: I have watched big companies negotiate special deals with the state to avoid paying their fair share, dumping their burden on smaller businesses like ours. I have seen individuals defraud this program by overstating the severity of their injuries or by stating that these injuries occurred at work when they did not. I have seen people in the medical fields readily support these claims without question.

Comment: My company operates in California, Oregon and Tennessee. I believe all these states provide better service and fraud investigation than does L&I in my experience.

The worker fraud department fails to thoroughly investigate and follow through on reports received. I have heard this from many employers.

Labor & Industries should investigate physicians and attorneys with high numbers of Labor & Industries claims who appear to work in tandem to obtain financial benefit from questionable claims with Labor & Industries.

Reduce fraudulent claims! Also get the illegals off the program!

Department response: The department takes fraud concerns very seriously, whether the issue is a claim, provider billings, or employer premium reporting. In the fiscal year that ended June 30, 2009, we conducted 5,185 claim investigations, up 15% from the year prior, with no increase in staffing. From those, we issued overpayments and fraud orders for $4.3 million, and saved an additional $5.9 million in costs avoided.

We focused on employer premium abuse and fraud as well, with a record 5,774 completed audits, a 37 percent increase from the prior year. Of those, 660 businesses were unregistered. Total audit premium assessments were $25.4 million for the year, another record.

Our provider efforts uncovered more than $7.9 million in assessments, with a further $2.5 million in estimated cost avoidance by preventing future inappropriate or fraudulent billings.

The agency is working actively to set up new forms of electronic cross-matching and other investigative tools to help us find the right case to investigate or audit.

If you suspect abuse or fraud, please report it immediately toll free at 1-888-811-5974 or online at www.fraud.lni.wa.gov. Referrals can be anonymous.

Regarding the comment about workers' compensation and those who may not be legally authorized to work, the department must assume a worker who is injured or develops a work-related disease is eligible to work when we establish his or her relationship to an employer.

Comment: Have programs for small business to partner with L&I to reduce accidents; do not send in inexperienced inspectors to issue out violation fines and source of revenue for the L&I Division. It takes a combination of changes and working together to accomplish the above.

Department response: L&I's Division of Occupational Safety & Health (DOSH) has information available for small businesses including safety guides, videos, publications that can be downloaded from our agency website, www.lni.wa.gov, under the "Safety" tab. In addition to video and written information, small businesses can request the help of our non-enforcement consultation program which has safety, health, and risk management specialists available to evaluate hazards and recommend solutions.

Concerning DOSH inspectors, our new hire training program is now more comprehensive for all new safety and health personnel, and includes on-the-job experience. It should also be noted that safety violation fines do not provide a revenue source for the department, but are deposited in the supplemental pension fund account which is used to pay cost-of-living increases for injured workers.

VOCATIONAL ISSUES

Comment: Vocational Services are an important piece in the system to those who actually take advantage of and stay with this program. Too many times I have seen employees enter this program and not stay with it while hundreds of dollars have been wasted. L&I typically will pay out a lump sum claim to these employees, and then more dollars are invested for retraining. Perhaps some investment could be saved by paying out the lump sum, then create a reimbursement program for retraining. I would be interested in seeing some statistics on how many persons actually complete retraining programs and the associated costs overall. Additionally, what it's the level of duplication in Washington State for worker retraining with the L&I program, WorkSource (Employment Security), PIC and the wide range of programs and supported funding at local community colleges? How much of the "future" administration costs that L&I is anticipating are associated with the vocational program?

Comment: As an employer of Washington employees and a company which regularly receives payment from L&I, I would like to offer our services to you in order to decrease your workers' compensation rehabilitation dollars.

Department response: Effective January, 2008, the legislature made significant changes in Washington's vocational rehabilitation services aimed at improved outcomes for workers and reductions in costs for the system and employers. Changes include:

- Expanded time and tuition benefits to make additional training programs available.
- Encourages programs in high-demand occupations.
- Required accountability agreements with workers.
- Allows workers the option of a vocational award and self-directed training while their claim is closed.

The outcomes of these changes, including information about workers who complete training and those who select self-directed training, are being evaluated over the next few years by the department and the University of Washington.

The vocational services for injured workers do not duplicate those available through WorkSource or community colleges. In fact, we partner with these programs. For example, many injured workers are in training plans provided through community colleges. The department currently has vocational specialists in place at six WorkSource locations.

The department's current model uses the services of private vocational rehabilitation professionals. They develop training plans, and monitor the worker's progress during their training.

COMMENTS ABOUT LABOR SUPPORT

Comment: One fact that jumped out to us at the public hearing on October 29th was that the only contingent of support for this tax increase came from a few union members or employees of labor organizations…The economy will not recover if small businesses cannot afford to stay in business, and every tax increase puts us all one step closer to that reality…

Comment: During the public hearing in Tumwater, representatives from organized labor groups testified in support of the tax increase…One even suggested de-funding the retrospective rating program at L&I to make up the revenue shortfall – a transparently political gesture which would, if enacted, use the tax overpayments of employers who have safer workplaces to cover the costs of the agency's ineptitude.

Since labor unions are employers and since they believe the rate increase is justifiable, they are obviously saying they would be willing to pay more. We suggest that L&I increase the labor union rates to take care of the 120 million premium shortfall. They could also make up the additional medical aid charges to bring the worker share back to 25% and they should pay for the self insurance premiums for supplemental pension assessments too…

Department response: The department considers the comments of both labor and business when deciding the adopted premium rates. Workers pay a significant portion of the premiums in Washington, as the statute specifies whether rates for a fund are paid by employers or shared equally by employers and workers. The department does not have the authority to increase the rate for individual classes more than indicated by the data in order to subsidize other rate classes.

COMMENTS FROM LABOR REPRESENTATIVES

Comment: With regards to the two rate proposals before us, we would suggest that L&I reject out of hand raising rates by 9.4%. L&I should adopt the rules regarding assigning occupational disease claim costs and this would result in both a more equitable distribution of charges for these claims as well remove the basis for increasing rates by 9.4%.

The rate proposal of 7.6% we find more acceptable with one exception. The proposed increase in the medical aid premium raises the overall premium contribution of workers from 27% to 27.8%. This we find unacceptable. 27% is already at an historic high and we think that the 2010 medical aid premium should not raise the workers share above this level.

This will have the result of lowering the proposed medical aid premium a little, but the medical aid reserve is the stronger of the two reserves and it will remain in the black. And while the accident fund reserve will go into the red for the first three quarters of 2010 becoming positive once again by the fourth quarter 2010, we think that this is based on an acceptable assumption that both the economy and the financial markets have bottomed out and are on the way to recovery.

When we eventually come out of this recession we would like to see the workers' share of the overall premium lowered to its historic average of 25%. We would also like to see rates set at the indicated levels, adjusted for investment returns, rather than at levels that are politically expedient.

Department response: The department has adopted the rule concerning how occupational disease claims that cannot be assigned to an employer are handled in the retro calculations, and has decided not to adopt the 9.4% rate increase proposal. The department has decided to raise the medical aid rates higher than the accident fund rates because the average medical costs in the past year grew at a higher rate than wages.

HORSE RACING ISSUES

Comment: The purpose of this memo is to request L&I recalculate the industrial insurance premiums for exercise riders both at major and nonprofit tracks. For trainers at major tracks, the WHRC requests L&I establish a premium based on the number of stalls occupied with horses in training on the ground of a Class A or B race track, and all horses in training off the grounds of a Class A or B race track that are subject to being ridden by exercise riders licensed by the WHRC. In 2009 there were 1610 stalls (either on the grounds or off the grounds at farms or training centers) assigned to thoroughbred race horse in training. For 2010 we anticipate this number of stalls to remain consistent with 2009.

For trainers at nonprofit tracks, the WHRC request L&I establish a premium based on the number of different horses started at a nonprofit race meet. In 2009, trainers started 415 different horses at our five nonprofit race meets. We also anticipate this number of starts to remain consistent for the 2010 racing season.

Department response: The department worked with the Washington Horse Racing Commission and the Horsemen's Benevolent Protective Association to determine the appropriate rate in response to their request to convert their rate to a per horse or stall rate rather than a rate per 12 stalls.

CHORE SERVICES ISSUES

Comment: Many companies in 6509 (and 6108, nursing homes) serve low-income residents receiving assistance from Medicaid. Labor is our biggest cost. High increases in workers compensation insurance rates are not matched by high increases in Medicaid payments from the state of Washington, and the rates we now receive for Medicaid are insufficient. Who is going to care for the senior citizens if more companies refuse to take additional, or any Medicaid residents? Providers are getting squeezed by the state from the revenue side and the cost side.

Comment: Home care agencies in particular have been hit, on average, with an 11% increase, much higher than the 7.6% proposed average increase.

Workers in classification 6512 have exactly the same work duties as our Aides and their base rate is .4281. The workers have no share of contribution. The State, through the Home Care Quality Authority, pays the entire portion of this rate. So, one department of state government is paying another – at a much lower rate than home care agencies, especially ours.

Department response: We are unable to comment on reductions in payments that may be made by DSHS or Medicaid. The workers' compensation rates set by the department reflect the amount of premium needed to cover the claims expected for the risk class. The past frequency and cost of claims for class 6512 has been significantly lower than the costs for classes 6509 and 6511. Based on this, the estimated costs for claims that are expected to occur in calendar year 2010 for 6512 are lower, and the necessary premium rate per hour worked is less. The proposed rates for classes 6509 and 6511 are higher than the average of 7.6 percent because the historical total claims experience trends for each class have been worse than average.

CLASSIFICATION ISSUES

Comment: After reviewing the Department of Labor & Industries recent mailing concerning the proposed rate increases for 2010, the members of Seattle Dog Daycare Association are moved to appeal the rate change for our business class. We feel singled out by the large 18% increase for our risk class 7308.

Department response: The department's Classification and Actuarial Services will consider this request and will provide a response concerning whether there are sufficient hours and experience to support separate classes.

OREGON VS. WASHINGTON ISSUES

Comment: Our number of employees varies depending upon the time of year and business levels, with averages of 125 and 200 employees in the State of Washington. In 2008, our employees in the State of Washington worked 257,446 hours, and the premium paid to Washington's Workers' Compensation for 2008 totaled $368,835, or $1.43/hour. In the State of Oregon, employee worked 222,337 hours with a total premium of $183,304, or .82/hour. In 2008 we paid 66% more in workers compensation premium in the State of Washington than in the State of Oregon. The proposed 7.6% increase in the State of Washington worker's compensation premiums will result in an increased expense of approximately $28,000 shared between the company and our employees. The amount of premium paid per hour in the State of Washington will be more than twice that paid in Oregon for the same type of work.

Comment: We established a second warehouse site in Roseburg, Oregon two years ago to allow for growth in southern Oregon and California. Our experience with workers Compensation issues in Oregon has been extremely positive with our ability to "shop" insurance companies for cost and service. Private sector businesses, needing to keep fiscally sound, use every means to get workers compensation claims fairly adjudicated in much less time than our Washington State counter parts.

We would like the state of Washington to allow private sector insurance companies to compete for the Workers Compensation business in the state. This reform is important to the long term financial health of companies like us and hundreds of others like us in this state. Competition drives excellence with employees and with businesses who want to mature and meet their long term goals. Competition invites creativity and puts businesses in position to succeed by helping their clients (customers) succeed and by continuing to be financially viable.

Department response: Your company may have two different rates in two states due to:

a) Different mix of business between the two states
b) Different past experience leading to different experience factors in each state.
c) Different base rates for the risk classes used in the two states.

Oregon regularly publishes a rate study comparing all the worker compensation systems in the nation. In the 2008 Oregon study, Washington ranked 38th in premiums – meaning 36 states and the District of Columbia have higher rates. Oregon ranked 39th.

While most states utilize the classification system of the National Council on Compensation Insurance (NCCI), they do create unique classifications in individual states. Washington's classification system is very similar, however they are different in many cases. A direct comparison of classifications can be made in some cases between different states, but in other cases they are unique.

Finally, workers' compensation coverage provided by private insurers is not an option under existing law.